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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 19 71
No. 71-369

GUILFORD DINSMUIR SHAW,

Petitioner,

v.

PETER PITCHESS, Sheriff
of Los Angeles County,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, JUDGMENT AFFIRMING JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA.

This is a Petition of Guilford Dinsmuir Shaw for Writ of Certiorari to review the Judgment and Order made by the Court of Appeal for the Ninth Circuit affirming the Judgment against Guilford Dinsmuir Shaw made and entered by the U. S. District Court for the Central District of California on March 24, 1971.

A copy of the Opinion of the Court of Appeal for the Ninth Circuit is attached

(Appendix A).

JURISDICTION

This Court has jurisdiction under Title 28, U. S. C. Section 1254(1) and revised Rules of the Supreme Court of the United States, Rule 19. 1 (b).

STATEMENT OF THE CASE

Petitioner was found guilty, along with a co-defendant, of a violation of California Penal Code Section 288 (a) (a oral copulation) after a jury trial, in Action No. 303114 in the Superior Court of the State of California for the County of Los Angeles.

On November 30, 1965, he was sentenced to one year in the Los Angeles County Jail, suspended on condition of payment of a $300.00 fine, two years probation, and certain probationary conditions.

Petitioner is presently on O. R. Release, pending execution of sentence, which has been stayed by the trial court pending these proceedings and is in constructive custody only.

California Penal Code Section 290 imposes a requirement of mandatory registration as a sex offender upon conviction of the charge herein, and said registration has also been stayed pending the outcome of these proceedings.

An appeal was taken to the California Court of Appeal and when that was denied, a petition for hearing was filed in the California Supreme Court. The petition for hearing was denied and an Appeal and Petition for Writ of Certiorari were made to the U. S. Supreme Court, and on May 26, 1969, said Appeal and Petition were also denied.

A Petition for Writ of Habeas Corpus was then filed in the United States District Court, Central District of California, on October 24, 1969.

Said Petition for Writ of Habeas Corpus was denied on November 26, 1969, without an evidentiary hearing. Notice of Appeal was filed on December 23, 1969. A certificate of probable cause, signed by the Honorable Jesse W. Curtis, U. S. District Judge, was filed on June 7, 1970.

The matter was then appealed to the Court of Appeals for the Ninth Circuit and the judgment of the District Court was affirmed, as above set forth; after timely Petition for Rehearing was denied by the Court of Appeals, this Court granted until September 14, 1971 to file this Petition.

QUESTIONS PRESENTED

1. Whether in a felony prosecution in a state court, jurisdiction is acquired over the person of the accused upon his initial

appearance before the court, where: (a) Under state procedure, such jurisdiction, exists, if at all, only by reason of the filing of a felony complaint with the court by the district attorney; and (b) State procedure restricts the court to the four corners of the complaint for the facts to justify a warrant of arrest; and (c) State procedure affords the court, prior to the accused's first appearance before it, no other source of information as to probable cause of guilt than the complaint; and (d) The complaint filed, for fourth amendment reasons, does not contain sufficient information within its four corners to lawfully empower the court to issue a warrant for the arrest of the accused?

2. Whether California Penal Code Section 288 (a), making it a felony for consenting adults to engage in oral copulation, is unconstitutional as being obnoxious to due process and beyond the police power of the state?

3. Whether fourth amendment rights to privacy in the use of a toilet in a stall in a public men's restroom, free from police surveillance, are waived as a matter of law if the stall has three covered sides but no door and is uncovered on the fourth side?

4. Whether in a criminal prosecution, where it appears to the state court of review that the trial court has committed error of constitutional dimensions in receiving certain evidence, and the Chapman harmless error rule is purportedly applied, does the state court of review have any discretion to hold the said error

harmless if, disregarding presumptions in favor of the verdict on appeal, it is possible to draw a reasonable inference that the said erroneously admitted evidence dissipated reasonable doubt as to defendant's guilt that otherwise would have resulted in acquittal?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set forth in Appendix C. They are: Amendments IV and XIV to the United States Constitution; California Penal Code Sections: 288a, 290, 806, 813, 814, 859, 859a, 948, 949.

STATEMENT OF THE FACTS

The evidence introduced against petitioner consisted primarily of the following:

1. Testimony that the police set up a hidden vantage point for the purposes of spying upon the activities within a public mens' rest-room in a public restaurant, with the consent of the management; and that said vantage point consisted of a ladder faced against the wall of a room adjacent to the said restroom so that someone perched on the ladder, by peering through a false vent in the wall, would have view of the restroom from the adjacent room without being seen in the restroom.

2. Testimony of the arresting officer that he had been at the vantage point for a long period of time, spying upon the restroom for the purpose of discovering offenses for which he could make arrests; and that finally, he purportedly observed, unknown to defendants, an act of oral copulation between petitioner and his co-defendant which could have been less than one-second in duration, after which time he left his vantage point.

3. There was no evidence of any spoken communication between the petitioner and his co-defendant prior to the alleged illegal act nor was there evidence that they knew each other or had met by prearrangement.

4. The arresting officer testified that upon interrogation at the police station after the arrests, petitioner and his co-defendant each made statements about the other; and this testimony was admitted over the vigorous objection of petitioner.

Turning to the written complaint initiating the prosecution against the petitioner, said document consists of conclusory allegations that the petitioner violated California Penal Code Section 288 (a); and said allegations are purportedly verified upon information and belief, there being no positive statement by the declarant as to the source of his information or the reasons for his belief. (The Complaint is reproduced in Appendix "B".)

REASONS FOR GRANTING THE WRIT

Petitioner urges that the questions presented herein are of sufficient scope and importance to warrant the attention of this Honorable Court for the following reasons:

First: The felony complaint which petitioner protests herein is of a type under which countless thousands of persons are prosecuted every year in Los Angeles County. If petitioner is correct that such complaints are bad, many, many persons are therefore deprived of important constitutional rights and many persons are needlessly subjected to criminal procedures that the necessity of a complaint sufficiently explicit to meet constitutional requirements would obviate.

Second: Petitioner's second and third questions presented highlight an important area of personal freedoms. How far may the state legitimately interest itself in private sexual behavior between consenting adults? Griswold and more recent cases take the view that the state may not intrude at all in the marital bedroom. If this is so, why should the state be permitted to intrude at all in consensual relationships between non-married couples of opposite sex or couples of the same sex when such relationships, after all, in the sexual area are essentially a matter of personal taste?

Furthermore, the question arises whether the price that has to be paid for arbitrary enforcement of state prohibitions against sexual

acts between consetning males is too high. Do all males have to suffer the discomfort[1/] of being spied upon by the police in order to avail themselves of the facilities of a public rest-room in the interests of stamping out a practice that a large segment of our populace considers legitimate and which is of dubious concern to the state?

Third: The final question presented herein is concerned with the viability of the Chapman rule of harmless error. Clearly, if an appellate court of a state gives lip service to the Chapman rule but still implicitly applies

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1/ The following language of the majority in Smayda v. United States, 352 F. 2d 251, the leading case condoning clandestine police surveillance of public toilet facilities is instructive of this regard:

> "We agree that every person who enters an enclosed stall in a public toilet is entitled to believe that, while there, he will have at least the modicum of privacy that its design affords. We would not uphold a clandestine surveillance of such an area without cause. We are made as uncomfortable as the next man by the thought our own legitimate activities in such a place may be spied upon by the police."

its own, stricter harmless error rule, the pronouncement of this Honorable Court on the subject has no effect. The problem is: to what extent should this Honorable Court intervene in limiting the discretion of a state appellate court to apply the Chapman rule? What, if anything, would amount to an abuse of discretion in application of the Chapman rule by a state appellate court?

Fourth: There is conflict in the Circuits; see Cotner v. Henry, 394 F. 2d 873 wherein the Seventh Circuit found unconstitutional the Indiana sodomy statute which is in contrast to the action of the Ninth Circuit in upholding the constitutionality of California's Penal Code Section 288 (a) in the instant case.

ARGUMENT OF THE CASE

I

Whether in a Felony Prosecution in a State Court, Jurisdiction Is Acquired Over the Person of the Accused Upon His Initial Appearance Before the Court, Where: (a) Under State Procedure, Such Jurisdiction Exists, If At All, Only By Reason of the Filing of a Felony Complaint With the Court By the District Attorney; and (b) State Procedure Restricts the Court to the Four Corners of the Complaint For the Facts to Justify a Warrant of Arrest; and (c) State Procedure

Affords the Court, Prior to the Accused's First Appearance Before It, No Other Source of Information as to Probable Cause of Guilt Than the Complaint; and (d) the Complaint Filed, for Fourth Amendment Reasons, Does Not Contain Sufficient Information Within Its Four Corners to Lawfully Empower the Court to Issue a Warrant for the Arrest of the Accused?

The prosecution against petitioner was initiated by the filing of a criminal complaint with the trial Court. Under California criminal procedure, such complaint serves as the basis of the Court's initial personal jurisdiction (Cal. P. C. 806, 859, 859a, 948, 949 -- see Appendix C). Furthermore, it serves as the basis, and the only basis, for the issuance of a warrant of arrest, i.e., the Court can look to no other source for the facts upon which to predicate the warrant of arrest (Cal. P. C. 813, 814 -- see Appendix C; Miller v. Justices Court, 123 Cal. App. 2d 696).

The complaint filed in petitioner's case cannot support a warrant of arrest because the charge is made in conclusory terms, the document is verified on information and belief and there are no direct allegations as to the nature of the information or the reasons for the belief. In short, the Court could not reasonably find probable cause to believe that the petitioner had committed the crime charged within the four corners of the said document and hence the

Fourth and Fourteenth Amendments to the United States Constitution protected petitioner from arrest. (Giordenello v. United States, 357 U.S. 480; Aguilar v. Texas, 378 U.S. 198; Ker v. California, 374 U.S. 23; Barnes v. Texas, 380 U.S. 253; People v. Sesslin, 68 Cal. 2d 418; People v. Chimel, 68 Cal. 2d 436.)

This being so, i.e., the Court having no probable cause to believe that petitioner had committed the crime charged, it follows that the same constitutional protections prevented the Court from using any force against petitioner at all. It seems plain that if the Court could not properly order the petitioner into its presence, it could not properly hold him in its presence for further proceedings simply because he kept his promise, when given his freedom on bail, to appear in the presence of the Court without being compelled to do so by the police.

Personal jurisdiction over a defendant in a criminal case is of course dependent upon the power of the Court properly and lawfully to compel the defendant's appearance to follow its wishes by use of threat of use of force (Michigan Trust Co. v. Ferry, 228 U.S. 346; Ex Parte MacDonald, 45 Cal. App. 480). It follows that the California Courts had no jurisdiction over the person of the petitioner from the very outset of the prosecution.

Since petitioner objected to the personal jurisdiction of the Court on the foregoing theory at the earliest possible moment permitted by

California procedure (at the preliminary hearing), there can be no suggestion of waiver of the defect (People v. Wilson, 106 Cal. App. 2d 716; Rinter v. Municipal Court, 175 Cal. App. 2d 786).

II

Whether, California Penal Code Section 288 (a), Making It a Felony for Consenting Adults of Either Sex to Engage in Oral Copulation with Consenting Adults of Either Sex, Is Unconstitutional as Being Obnoxious to Due Process and Beyond the Police Power of the State?

To be a valid expression of the police power, Cal. P. C. Section 288 (a) must meet a double test: (1) Is the purpose of the statute a matter of legitimate public interest? and, (2) Are the means employed by the statute reasonably necessary for the accomplishment of said purpose and not unduly oppressive? (Goldblatt v. Town of Hempstead, 369 U. S. 590.)

With reference to the first test, it is urged that oral copulation, when confined to mutually consenting adults, and conducted in private, is not a practice that is a proper subject of public interest. Such practice is as intimately connected with personal taste and background as the choice of food.

Recent cases such as Griswold v. Connecticut, 381 U. S. 479 and Cotner v. Henry.

394 F. 2d 873 import the proposition that such acts of personal taste of married couples, i.e., with respect to private, marital relations, are not a proper subject of state regulation. (In Pruett v. State, 463 S.W. 2d 191, the Texas Supreme Court reached this conclusion on the basis of difficulty of proving a forbidden marital act.)

However, there is no reason to confine this protection to married couples. It has been broadly held that absent some demonstrable necessity, matters of good or bad taste are to be protected from governmental regulation (e.g. Roberts v. Clement, 252 F. Supp. 835).

> "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." (Bates v. Little Rock, 361 U.S. 516, 524.)

With respect to oral copulation between consenting, adult males, the specific charge made against petitioner (though the statute makes no differentiation and no distinctions), such practice is certainly not uncommon throughout our cultural history. Indeed, studies have shown the practice to widely exist at the present time (compare: Alfred C. Kinsey, Wardell B. Pomeroy, and Clyde E. Martin, Sexual Behavior in the Human Male, Philadelphia, W. B. Saunders, 1948; The Wolfenden Report, Report of the Committee on Homosexual Offenses and Prostitution, Stein and Day, New York, 1963).

Hence, ill effects on society, if such existed, would of necessity be readily apparent. However, there is no apparent evidence whatsoever that persons who indulge in the practice in question are any less able to otherwise function morally and ably in society than persons who do not do so. Therefore, apart from religious considerations which can hardly justify state intervention in view of the First Amendment, there is no basis for state interest in private acts between consenting males, including oral copulation.

Turning to the second test, it is urged that penal sanctions are an unreasonable and unduly oppressive means of state action in this area. Penal sanctions against oral copulation are almost totally unenforceable in the absence of invasions of privacy and a type of "peeping" by law enforcement authorities destructive of common decency and cherished liberties (compare: Pruett v. State, 463 S.W.2d 191).

A governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. (NAACP v. Alabama, 377 U.S. 288, 307.) A prohibition which requires for its enforcement means engendering a feeling of discomfort in any male using a public toilet facility, i.e., a discomfort caused by the likelihood that his private acts are under hidden surveillance by the police, obviously invades the area of protected freedoms.

Hence, penal sanctions are certainly a constitutionally improper method to be employed by the state in pursuit of whatever legitimate interest it may have in preventing oral copulation, privately, between consenting adults of either sex.

III

Whether Fourth Amendment Rights to Privacy in the Use of a Toilet in a Stall in a Public Men's Restroom, Free From Police Surveillance, Are Waived as a Matter of Law If the Stall Has Three Covered Sides But No Door and Is Uncovered on the Fourth Side?

The evidence against petitioner was obtained by a police officer while peeping into a public men's restroom at the alleged acts of defendant while defendant was sitting on a toilet in a stall, enclosed on three sides. No warrant or other legal process authorized this surveillance though it was undertaken with the permission of the owner of the restroom.

Clearly, the stall containing the toilet was a constitutionally protected area. The Fourth Amendment to the United States Constitution protects people, not places (Katz v. U.S., 389 U.S. 347, 351). Hence, whenever an individual may harbor a reasonable expectation of privacy he is entitled to be free from unreasonable government intrusion (Terry v. Ohio, 392 U.S. 1, 9; People v. Bradly, 1 Cal.3d 80, 84). Obviously, a man using the facilities of a public

restroom offered for his convenience by the management of a restaurant inviting his patronage can expect privacy in using the toilet in an enclosed stall in such facilities. (Compare: Britte v. Superior Court, 58 Cal. 2d 469; Bielicki v. Superior Court, 57 Cal. 2d 602.)

The theory advanced by cases such as People v. Roberts, 256 A. C. A. 537 that the constitutional protection is waived as a matter of law where the toilet stall, as in this case, lacks a door and is enclosed only on three sides has no logical validity. Waiver and consent necessarily imply conscious forethought. It appears obvious that an ordinary patron of a restaurant using its toilet facilities provided for his convenience would, in the absence of warnining, have no reason to expect anyone to take interest in watching him use such facilities and hence would not be aware of waiving any constituional rights of privacy when doing so. There is a presumption against the waiver of fundamental constitutional rights and consent to a violation of the right to privacy will not lightly be inferred; and the question of such waiver or consent is one of fact, not law (Rogers v. U.S., 369 F. 2d 944, cert. den. 388 U.S. 922).

The other justification for withholding the protection of the Fourth Amendment, given by the majority in Smayda v. United States, 352 F. 2d 251, is that where such restrooms are known places for those interested in forbidden acts to congregate, general surveillance

by the police is so necessary in order to prevent crime as to overcome the interest in privacy.

The answer to Smayda is that such police surveillance, as occurred in petitioner's case, is of a general nature since the officer peeps from a hidden vantage point in the hope of observing a criminal act by someone; i.e., no definite criminal or crime is the focus of attention. In other words, such surveillance is a form of exploratory search. It is now well established that exploratory searches, while certainly an aid to law enforcement, are such an infringement on personal liberties as to be forbidden by the Fourth Amendment (e.g. United States v. Lefkowitz, 385 U.S. 452; Lewis v. U.S., 385 U.S. 206).

Petitioner therefore urges that Smayda is no longer the law and that the police surveillance was unlawful.

IV

Whether in a Criminal Prosecution, Where It Appears to the State Court of Review That the Trial Court Has Committed Error of Constitutional Dimensions in Receiving Certain Evidence, and the Chapman Harmless Error Rule Is Purportedly Applied, Does the State Court of Review Have Any Discretion to Hold the Said Error Harmless, If, Disregarding Presumptions in Favor of the Verdict on Appeal, It Is Possible

to Draw a Reasonable Inference That the Said Erroneously Admitted Evidence Dissipated Reasonable Doubt As to Defendant's Guilt That Otherwise Would Have Resulted in Acquittal?

Over defendant's objection, the trial court permitted the arresting police officer to testify as to alleged custodial statements of petitioner and his co-defendant. Taken together, these statements amounted to an admission of a mutual solicitation to oral copulation. The state appellate Court found that reception into evidence of the extra-judicial statement of petitioner's co-defendant was error of constitutional dimensions in view of Bruton v. U.S., 20 L.Ed. 476, People v. Aranda, 63 Cal. 2d 518 and People v. Charles, 66 Cal. 2d 330. It accordingly held that the California harmless error rule would not be applied and that it would instead apply the more liberal harmless error rule of Chapman v. California, 386 U.S. 18 which requires that error be adjudged reversible and not harmless unless it appears beyond a reasonable doubt that the verdict was not affected adversely to the accused by reason of the error.

Petitioner of course has no quarrel with these rulings of the State Appellate Court. However, the State Appellate Court went on to hold that even under the Chapman rule, the error was harmless. Petitioner urges that in all logic the State Appellate Court had no discretion